

**Brookline Board of Appeals
March 3, 2016, 7:00 PM
Public Hearing**

**333 Washington Street
6th Floor Selectmen's Hearing Room**

Board Members Present: Jesse Geller (Chairman), Christopher Hussey, Kate Poverman
Staff Present: Michael Yanovitch (Building Dept.), Jay Rosa (Planning Department)

189 Eliot Street

Proposal: Construct a single-story rear addition

Zoning District: S-10 (Single-Family)

Precinct: 13

Board Decision: Relief request **withdrawn without prejudice**

175 Freeman Street

Proposal: Modify BOA #2011-0041 to utilize excess parking in underground garage for non-resident use

Zoning District: M-2.0 (Apartment House)

Precinct: 2

Board Decision: Modification request **granted**, subject to conditions

191 Clyde Street

Proposal: Demolish existing multi-purpose stable building and construct a new multi-purpose building

Zoning District: S-40 (Single-Family)

Precinct: 15

Board Decision: Relief request **granted**, subject to conditions

Minutes shall be posted on the Town of Brookline website (<http://www.brooklinema.gov/564/Zoning-Board-of-Appeals>) upon approval. Draft minutes shall be made available upon request.

Decisions shall be posted on the Town of Brookline website (www.brooklinema.gov). Appeals, if any, shall be filed with land court or superior court within twenty days after the date of filing of such notice in the office of the town clerk.

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7:00PM

189 Eliot Street – Construct a single-story rear addition

Board Chairman Geller opened the hearing and called case #2015-0074. Mr. Geller reviewed standard hearing procedure.

Property owner Melvin Shuman, of 189 Eliot Street, waived the reading of public hearing notice for the record and stated that he is seeking zoning relief in order to construct a small addition at rear of his single-family home. This addition will extend an existing kitchen and relocate laundry and bathroom facilities. Mr. Shuman confirmed that zoning relief for the resulting Floor Area Ratio (FAR) is required to initiate this proposal. Mr. Shuman also submitted three letters from abutting residents in support of this addition to the Board.

Mr. Shuman suggested that the Board has three alternative options in evaluating/granting this zoning relief. Mr. Shuman first stated that Zoning By-Law Section 5.22.3.c allows for an FAR increase provided that the proposed exterior addition is less than 350 square feet in size and the resulting FAR is no greater than 150% of the allowed FAR as of right. Mr. Shuman acknowledged that this clear request is slightly complicated by the fact that previous zoning relief was provided under this section of the Zoning By-Law to construct a 196 square foot addition to this structure in 1986. This addition was constructed by a previous owner and did not exceed the previously stated 350 square foot maximum. Mr. Shuman explained that this prior exterior addition, in combination with his proposed 136.3 square foot addition, represents a net floor area increase of 332 square feet. Mr. Shuman believed that the intent of this Section of the By-Law is to allow for exterior additions of up to 350 square feet. Mr. Shuman believed that his proposed exterior addition satisfies all requirements for the grant of a special permit under By-Law Section 5.22.3.c.

Alternatively, Mr. Shuman stated that M.G.L. c.40A, Section 6 provides protection for single and two-family dwellings that are pre-existing nonconforming in nature. Under this statutory regulation, he is permitted to extend said pre-existing nonconformity if the Board finds that the project will result in no substantial detriment to the neighborhood. Mr. Shuman specifically cited *Deadrick v. The Zoning Board of Appeals of Chatham* (2014) as applicable case law. Mr. Shuman stated that the FAR in question is defined as a pre-existing nonconformity and the modest rear addition will have “very little impact” on abutting residents.

Mr. Shuman concluded his comments by reviewing project compliance with the statutory requirements for a variance if the Board does not believe that the requested zoning relief can be

granted under his two prior arguments. Mr. Shuman argued that the subject property is undersized for this particular S-10 zoning district at 9,418 square feet. The prior special permit history of the property is a burden placed on Mr. Shuman as the property owner that precludes him from expanding his structure, particularly the existing kitchen, which Mr. Shuman described as being inadequate.

The Board had no further questions and Chairman Geller called for public comment in favor of, or in opposition to the Petitioner's proposal.

No members of the public commented on the proposal.

Board Chairman Geller requested that Zoning Coordinator, Jay Rosa, review the findings of the Planning Board. Mr. Rosa stated that the Planning Board had no objection to this proposed single-story addition. Board members felt that the floor area increase is modest and the rear location will result in little to no impact on abutting residents. The Board did consider the applicability of a Section 6 finding but obviously defer to the Board of Appeals ruling on that matter. Therefore, the Planning Board recommends approval of floor plans and elevations by Michael J. Huller, dated 11/20/2016, and the site plan by Bruce Bradford, dated 12/1/2015, subject to the following conditions:

1. Prior to the issuance of a building permit, the applicant shall submit final floor plans and elevations, subject to review and approval by the Assistant Director for Regulatory Planning.
2. Prior to the issuance of a building permit, the applicant shall submit to the Building Commissioner for review and approval for conformance to the Board of Appeals decision:
1) a final site plan, stamped and signed by a registered engineer or land surveyor, 2) final floor plans and elevations, stamped and signed by a registered architect, and 3) evidence that the Board of Appeals decision has been recorded at the registry of Deeds.

Board Chairman Geller requested that Deputy Building Commissioner, Michael Yanovitch review the findings of the Building Department. Mr. Yanovitch believed the proposal to be a minor alteration to the existing structure. Mr. Yanovitch stated that the proposal is worthy of relief but agreed with Mr. Shuman that the most applicable method to grant this relief is uncertain. Mr. Yanovitch stated that the last sentence of Zoning By-Law Section 5.22.3.c clearly precludes a subsequent grant of special permit relief under that same section. Additionally, Mr. Yanovitch believed that the Section 6 finding is also a flawed request because the prior special permit relief specifically for the nonconforming FAR effectively eliminates the grandfathered protection and the grant of a special permit renders the property as lawful rather than pre-existing nonconforming. Mr. Yanovitch believed that the only feasible mechanism to grant the requested relief does fall under the variance finding and the burden for establishing compliance with the statutory requirements for a variance does fall on the Petitioner.

Board Deliberation

Board Chairman Geller agreed that this proposal is minor and a reasonable request if special permit

relief was available for the resulting FAR, however he was not satisfied that the various options for the grant of this relief as outlined by Mr. Shuman are appropriate in this instance.

Mr. Geller did not agree that the Board has the capacity to essentially reopen and modify the prior case that granted relief for an exterior addition even though the prior applicant did not fully utilize the allowable 350 square foot maximum. Mr. Geller believed this strategy to be a “runaround” from the purpose and language included in By-Law Section 5.22.3.c.

Mr. Geller believed that a M.G.L. c.40A, Section 6 finding would be the simplest solution however the prior grant of FAR relief does eliminate the pre-existing nonconforming status described by Mr. Shuman.

Mr. Geller believed that the variance option is the most applicable argument as briefly articulated by Mr. Shuman.

Board Member Christopher Hussey stated that the Board often hears proposals to expand kitchen space in order to modernize interior space, particularly amongst older homes in Brookline. Mr. Hussey stated that undersized kitchens were a common architectural feature but a more modern emphasize on the kitchen as a communal family space has led to a host of similar projects. Mr. Hussey was receptive to the argument that the undersized nature of the existing kitchen, as well as the kitchen configuration, could constitute a hardship in this instance if the Board indeed considers the validity of a variance argument.

Board Member Poverman agreed that the scale of Mr. Shuman’s proposed addition is modest but she was not satisfied that clear uniqueness and hardship have been established by the Petitioner. Ms. Poverman also was not convinced that the prior grant of a special permit is unduly burdensome for the property owner.

Mr. Shuman clarified that the statutory standard for the grant of a variance does not require a unique hardship but rather lot uniqueness and hardship. Mr. Shuman also stated that the prior grant of a special permit does increase the hardship associated with this proposal. Mr. Shuman believed that the undersized nature of his lot and the prior grant of a special permit prevent him from constructing a modest exterior addition that the vast majority of surrounding property owners would be permitted to do under various FAR allowances included in By-Law Section 5.22.

The Board did not reach a unanimous consensus that the statutory requirements for the grant of a variance are met.

Mr. Shuman requested to withdraw his proposal without prejudice.

Unanimous Board grant of a withdrawal without prejudice

175 Freeman Street – Modify BOA #2011-0041 to utilize excess parking in underground lot for non-resident use

Board Chairman Geller called case #2016-0007 and reviewed standard hearing procedure.

Project engineer Frederick Lebow of FSL Associates (358 Chestnut Hill Avenue, Boston, MA) waived the reading of public hearing notice for the record and introduced Chief Operating Officer of the Hamilton Company (property management), Carl Valeri. Mr. Lebow provided a brief history of the project. Mr. Lebow stated that 28 underground parking spaces have been rented to residents of the immediate neighborhood surrounding 175 Freeman Street. A special permit to rent these parking spaces was initially granted in 2010 with a condition that the relief must be renewed within one year. Mr. Lebow confirmed that various mitigation strategies including the installation of a sound wall and parking signs were incorporated based on community feedback and the special permit relief was extended for an additional 18 months in 2011. Mr. Lebow further stated that area residents often utilize this underground parking during winter months and are required to renew parking agreements on an annual basis. Mr. Lebow stated that the majority of area residents have no opposition to this parking arrangement as a result of improvements made by the Petitioner. Mr. Lebow confirmed that granted special permit relief was again extended for a five-year period in 2013.

Mr. Lebow requested that the Board modify these prior decisions to eliminate sunset provisions so the Petitioner will not be required to come before the Board on a regular basis to extended use-based zoning relief to rent parking spaces to non-residents.

Board Member Poverman requested that the Petitioner describe the availability of surface and garage parking. Mr. Valeri stated that 309 surface and garage spaces are available, all of which were constructed prior to the Hamilton Company purchasing the property in 2009. Mr. Valeri confirmed that there is a surplus of parking spaces and only underground spaces are available to rent to surrounding area residents.

Mr. Lebow stated that there has been limited complaint regarding the parking rental specifically. Mr. Lebow noted that prior complaint led to Board of Selectmen review and the installation of various noise and impact mitigation features as previously described.

Board Member Hussey questioned why the Petitioner is seeking further extension prior to the expiration of the 5-year period of relief. Mr. Lebow restated that ongoing Board renewal of this relief is burdensome and perhaps redundant because the Building Department is required to review compliance with imposed special permit conditions on an annual basis.

Board Chairman Geller called for public comment in favor of or in opposition to the Petitioner's proposal. No members of the public commented.

Mr. Geller requested that Zoning Coordinator Jay Rosa review the findings of the Planning Board. Mr. Rosa stated that the Planning Board did not hear this request for further extension. The parking layout has not been altered from prior iterations that were supported by the Board. Mr. Rosa confirmed that various mitigation techniques have been incorporated and the Town is not aware of any formal complaint regarding the rental parking since 2013. Mr. Rosa agreed that it is atypical to eliminate sunset provisions unless annual licensing review can provide replacement

town oversight. Mr. Rosa confirmed that this underground parking does not require an annual open air parking license from the Board of Selectmen.

Board Chairman Geller requested that Deputy Building Commissioner Michael Yanovitch review the findings of the Building Department. Mr. Yanovitch stated that Building Department does have enforcement authority to ensure that the Petitioner complies with all prior imposed conditions including annual review of parking rental details. The Town is moving toward a more cohesive transportation demand management evaluation process. Any improved Town practices on this matter would not apply to the 175 Freeman Street rental parking but Mr. Yanovitch was confident that previously imposed special permit conditions, which will not be altered by this modification request, effectively maintain Building Department oversight to ensure that all renters live within a 1,400 buffer of the subject property.

Board Deliberation

Board Chairman Geller confirmed that the Petitioner is exclusively requesting to eliminate previously imposed condition #4 which includes a 5-year special permit term that may only be extended following a unanimous vote of the Board of Appeals. Mr. Geller stated that he is not opposed to this request but cautioned that enforcement may be a challenge that is now shifted to the responsibility of the Building Department.

Board Members Hussey and Poverman concurred with Mr. Geller's comments and unanimously supported the Petitioner's request to modify prior Board of Appeals decisions #2010-0020 and 2011-0041.

Unanimous Board grant of modification request, subject to the following revised conditions:

1. Prior to the rental of any spaces, the applicant shall submit a final parking and site layout plan, including the demarcation of at least 10 parking spaces on site for guests of Dexter Park residents, any traffic control devices (gates signage, speed bumps, etc.), the loading dock areas, and the drop-off area off Freeman Street, subject to review and approval of the Assistant Director for Regulatory Planning.
2. The Petitioner shall submit to the Building Commissioner annually, a list of addresses and registration numbers of clients utilizing any of the 28 available spaces in the garage to insure compliance with use #22. The Petitioner shall provide evidence that residency was established by presentation of proof by those wishing to rent spaces.
3. Renters of the available spaces shall live within a 1400 foot radius of 175 Freeman Street.
4. The Petitioner shall provide signage on both sides of the garage door directing that all pedestrians not use the garage doors for entrance/exit; that all entrance/exit be through the main lobby.

5. Prior to the rental of any spaces, the applicant shall submit to the Building Commissioner for review and approval to ensure conformance to the Board of Appeals decision; 1) a final parking and site plan layout and 2) evidence that the Board of Appeals decision has been recorded at the registry of Deeds.

191 Clyde Street – Demolish existing multi-purpose stable building and construct a new multi-purpose stable building

Board Chairman Geller called case #2016-0001 and reviewed standard hearing procedure.

The Petitioner's Attorney, Robert Allen of the Law Office of Robert Allen waived the reading of public hearing notice for the record and introduced project representatives David Shag and Steven Ballard, as well as project architect Robert Olsen, of Robert Olsen + Associates Architects (374 Congress Street, Boston, MA). Attorney Allen described the subject property (the Country Club) as a 237 acre tract of land that includes multiple recreational and maintenance facilities, as well as 27 holes of golf. Attorney Allen stated that the applicant is proposing to fully demolish a former stables building that is currently used for fitness related activities. Attorney Allen stated that the project team worked closely with the Preservation Commission regarding appropriate modification to this primary historic structure. The project team wishes to modernize the facility and upgrade overall structural condition/safety. Initially, the project team desired to maintain the classic-revival style front façade but was ultimately unable to do so for structural reasons. Attorney Allen confirmed that the plans before the Board are supported by the Preservation Commission and detail a full demolition.

Attorney Allen confirmed that zoning relief is required for the resulting maximum building height of the stables building and off-street parking requirements associated with the expanded floor area.

Project architect Robert Olsen reviewed proposal details with the Board. Mr. Olsen reviewed overall project goals to replicate important historic elements including front columns, fenestration, and ventilators. The Country Club also maintains a clear desire to maximize the usable volume of interior portions of the structure in order to meet fitness needs and support the weight of equipment itself (steel and concrete floors). Mr. Olsen stated that these clear design goals dictated the slight height increase that triggers the need for zoning relief. Despite the excess height, Mr. Olsen stated that surrounding historic structures located around the Country Club's primary circular court area are consistent with the proposed maximum height of the stables building. Mr. Olsen provided various floor plans and elevations to illustrate the original historic layout, the initial proposal, and the final design that was supported by the Preservation Commission.

Board Member Hussey requested that the project architect confirm the maximum proposed height and the structural element that is dictating that calculations. Mr. Olsen stated that roof beams usually serve as the structural element that determines maximum height but in this instance a proposed skylight extends to a maximum height of 37' – 8". The Petitioner is seeking relief up to a height of 38 feet in order to account for construction tolerance, essentially room for error.

Board Members Hussey and Poverman clarified that the height maximum is requested in order to maximize usable interior space, particularly at the second floor. Mr. Hussey and Ms. Poverman both expressed concern that this desired maximization is by choice rather than necessity.

Mr. Olsen responded by stating that the façade shape is driven by the historic proportions of the stables building in combination with modern structural concerns including ceiling heights and structural stability. Mr. Olsen also stated that adequate air circulations and fire suppression systems account for the resulting maximum height. Attorney Allen further stated that this excessive height may be permitted through the grant of a special permit rather than a variance if that alleviates the Board Member's concerns.

Attorney Allen reviewed requested zoning relief in greater detail. Attorney Allen stated that a special permit is required to alter a non-conforming use that is pre-existing in nature and would otherwise require a special permit or variance to establish if proposed currently, in accordance with By-Law Section 4.03. Attorney Allen also confirmed that design review is required under By-Law Section 5.02.1.i for a structure/use of this size and parking requirement if located within a single-family district, which is the case in this instance. Attorney Allen confirmed that the Planning Board was satisfied that all relevant design review standards are met.

Attorney Allen further discussed overall parking requirements in accordance with Zoning By-Law Section 6.02. Attorney Allen agreed that a baseline understanding for required parking is difficult for this property because it is an oversized lot that provides member based services. Parking requirements for a standard recreation use is perhaps not the most accurate method to calculate overall parking requirements, and large portions of the stables building, particularly golf simulation activities, produce lower user numbers than the overall dedicated floor area may dictate. Attorney Allen briefly reviewed the parking history of the overall property including the construction of 64 parking spaces in 1985 and the construction of 112 parking spaces via special permit in 2000. Attorney Allen stated that these parking increases were not directly associated with structural expansion at the site. Attorney Allen confirmed that the pure floor area increase associated with the reconstructed stables building would require an additional 89 parking spaces. Attorney Allen believed that prior creation of parking more than adequately fulfills this new parking space requirement. Additionally, the Board may reduce overall parking requirements by special permit if the Board is satisfied that shared on-site parking is sufficient (§6.02.1.c) or if the Board determines that the proposed use is of a kind that the occupancy of floor space by customers, clients or employees is substantially below the normal or average for retail or office uses (§6.02.5.d).

Board Member Poverman questioned if the proximity of provided parking to the stables building itself has any impact on this line of evaluation.

Deputy Building Commissioner Michael Yanovitch stated that the entire property is under common ownership therefore the location of available parking does not diminish from its inclusion as overall shared on-site parking as long as ADA accessibility requirements are satisfied.

Board Members Geller and Hussey agreed that the subject property is atypical for the surrounding single-family district and the provided club parking has operated largely in a self-regulating manner.

Attorney Allen concluded his comments by stating that no building or part thereof shall exceed the maximum height requirement (35') as outlined in By-Law Section 5.30 except in a situation where interpretation of this requirement is based on a non-typical lot or characteristic. In that event the Board may issue special permit zoning relief under By-Law Section 5.31.2 if they are assured that the same standard of amenity will be provided to neighboring properties. Attorney Allen believed that the same level of amenity will be provided because the location of the stables building is not visible from adjacent properties due to significant distance and visual screening. Attorney Allen further stated that the adjacent clubhouse is taller than the proposed structure and the subject property is certainly non-typical.

Attorney Allen submitted a petition in support of the reconstructed stables building that was signed by 21 neighboring residents and stated that the general standards for the grant of a special permit in accordance with Zoning by-Law Section 9.05 are also satisfied.

Board Member Poverman requested that Attorney Allen address the statutory requirements for a variance if the Board is not satisfied that special permit relief may be granted for the maximum stables building height.

Attorney Allen stated that clear lot uniqueness and hardship associated with that uniqueness must be established in order to grant a variance. Attorney Allen restated that the 273 acre parcel is significantly oversized for the surrounding district and the reconstruction of this historic structure comes at significant cost to the country club, which could be interpreted as a financial hardship. Attorney Allen further stated that proposed reconstruction of the stables building is motivated by structural safety and overall facilities improvement.

Board Chairman Geller called for public comment in favor of, or in opposition to, the Petitioner's proposal.

No members of the public commented.

Board Chairman Geller requested that Mr. Rosa review the findings of the Planning Department. Mr. Rosa stated that the Planning Board had no objection to the reconstruction of the multi-purpose stables building. Board Members agreed with the Preservation Commission that the proposed design is sensitive to the historic character of the surrounding complex. As far as the requested height and parking relief, Board Members had no objection because the slight height increase is not anticipated to generate any adverse impact on abutting residents, which aligns with the requirements included in Zoning By-Law Section 5.31.2. The lot and use can easily be defined as being unique within the single family district so Board Members agreed that existing shared on-site parking is adequate to serve the proposed additional floor area resulting from the stables building reconstruction. Therefore, should the Board of Appeals find that the statutory findings for a variance are met, the Planning Board recommends approval of the plans by Robert Olson + Associates Architects, dated 12/9/2015, subject to the following conditions:

1. Prior to the issuance of a building permit, the applicant shall submit final plans and elevations of the Stables Building subject to the review and approval of the Assistant Director of Regulatory Planning and the Preservation Commission staff.
2. Prior to the issuance of a building permit, the applicant shall submit to the Building Commissioner for review and approval for conformance to the Board of Appeals decision:
 - 1) a final site plan stamped and signed by a registered engineer or land surveyor; 2) final building elevations stamped and signed by a registered architect; and 3) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Board Chairman Geller requested that Mr. Yanovitch review the findings of the Building Department. Mr. Yanovitch stated that this proposal if granted necessary relief does not derogate from the purpose of the Zoning By-Law and it is not anticipated to result in any adverse impact on abutting properties. Mr. Yanovitch agreed that the provisions included in By-Law Section 5.31.2 are valid in this instance because the standard evaluation of building height is not easily applied to this unique lot within the single-family district. Mr. Yanovitch confirmed that if the Board does find that the requirements for the grant of relief are satisfied, the Building Department will work with the Petitioner to ensure compliance.

Board Deliberation

Board Chairman Geller was satisfied that the proposed stables building reconstruction does meet the By-Law standards for the grant of a special permit under By-Law Section 9.05. Mr. Geller also noted that the reconstructed building follows the existing building footprint and is comparable in height to several surrounding multi-purpose structures. Mr. Geller also supported Attorney Allen's parking evaluation. Mr. Geller agreed that the application of a parking credit is consistent with Board and Building Department interpretation and the parking demand is largely self-regulated.

Mr. Geller did request further Board discussion regarding the applicability of By-Law Section 5.31.2 when considering the maximum height of the reconstructed stables building.

Board Member Poverman stated that she was concerned about potential exploitation of this provision if the Board finds that an oversized lot may satisfy the non-typical lot requirement included in By-Law Section 5.31.2.

Mr. Yanovitch stated that clear guidelines (§5.30) dictate how maximum height of a structure is calculated but these highly specific provisions are often dependent on the determination of the record grade of lot lines and/or public ways. This language is often clearly applied but, in this instance, the stables building is located thousands of feet away from surrounding public ways. Mr. Yanovitch appreciated Ms. Poverman's hesitation but he was confident that the subject property is indeed atypical in terms of determining how the maximum height of the stables building should be calculated.

Board Chairman Geller stated that the term non-typical lot characteristic included in By-Law Section 5.31.2 is perhaps the most accurate description of the Country Club parcel as it relates to potential exemptions to maximum height regulations.

Board Member Hussey stated that the Country Club parcel is an aberration within the surrounding S-40 district, particularly when calculating parking and height requirements. Mr. Hussey also agreed that the location of the stables building in relation to surrounding properties results in little to no adverse impact if the building is constructed to 37 feet in height.

Ms. Poverman concurred member comments and support the grant of special permit relief for both parking and maximum building height under By-Law Sections 5.31.2 and 6.02.1.c.

Unanimous Board grant of requested relief, subject to conditions stated for the record.

Hearing closed.